IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION No. 2677 OF 2006

Smt. Ramilaben Trikamlal Shah,)
Age 65 years, Residing at 401,)
Shanti Apartment, 98 Walkeshwar)
Road, Mumbai 400 066.) ..**Applicant**

Vs.

1. M/s. Tube & Allied Products)
A Partnership Firm, carrying on
Business at 114, Bajaj Bhavan,)
11th Floor, Nariman Point,)
Mumbai 400 021 and having their
administrative Office at)
Samruddhi 8th Floor, Opposite)
Gujarat High Court, Navrangpura
Ahmednagar 380 014 (Gujrat))

2. Mr. Shounak H. Chokshi)

3. Mrs. Sushilaben H. Chokshi)

4. Mr. Himanshu H. Chokshi Nos. 2)
3 and 4 are the partners of the
No.1 above named and having the
same address that of the No. 1)
mentioned hereinabove.)

5. State of Maharashtra)
(A formal party.)) .. **Respondents**

Mr. U. P. Warunjikar, Advocate for the applicant.

M. J. P. Shah i/b M/s.JPS Legal for Respondent Nos. 2 & 3.

Mr. A. S. Shitole, APP for the State, Respondent No.5.

CORAM : ABHAY S. OKA,J.

THE DATE ON WHICH SUBMISSIONS ARE HEARD : 4TH DECEMBER 2006

THE DATE ON WHICH JUDGMENT IS PRONOUNCED : 22nd DECEMBER, 2006.

ORAL JUDGMENT

. In view of the order dated 28th August, 2006 passed by this Court, this application is taken up for final hearing. This is an application for invoking powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code). The challenge in this application is to the order dated 19th June, 2006 passed by the learned Special Metropolitan Magistrate in a complaint filed by the Applicant under Section 138 read with 141 of the Negotiable Instruments Act,1881 (hereinafter referred to as the "said Act of 1881"). The first to fourth respondents have been arraigned as the accused in the said complaint.

2. The Applicant examined herself by filing an affidavit of examination-in-chief. The Applicant was cross-examined on 16th July, 2005. The examination and cross-examination of the Applicant was recorded by the learned Additional Chief Metropolitan Magistrate, 40th Court at Mumbai. Subsequently, the complaint was transfered to the Court of the learned Special Metropolitan Magistrate and the Judge of the Small Causes Court

at Mumbai. Thereafter, on 25th July, 2005, the Applicant examined her son as P.W. 2 by filing an affidavit of examination-in-chief. The P.W.2 was cross-examined by the Advocate appearing for first to fourth respondents. The statements of the first to fourth respondents under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the said Code") were recorded by the Special Metropolitan Magistrate. The arguments were heard and the case was closed for pronouncement of Judgment. Thereafter, an application was made by the first to fourth Respondents under Section 326 (3) of the said Code for a direction to hold a **de-novo** trial. By the impugned judgment and order dated 19th June, 2006, the learned Special Metropolitan Magistrate allowed the said application and directed holding of a **de-novo** trial. The learned trial Judge directed the first to fourth respondents to pay costs of Rs.5,000/-. The learned judge granted liberty to the Applicant to adduce fresh evidence.

3. The learned counsel appearing for the applicant has invited my attention to the judgment and order dated 11th August, 2006, of this Court (Coram : Justice D. B. Bhosale, J.) in Criminal

Application No. 252 of 2005 (**Shivaji S. Jagtap Vs. Rajan Hiralal Arora and another**). He submitted that Sub-section (3) of Section 326 of the said Code will have no application to the present case. He submitted that the record shows that the learned Metropolitan Magistrate 40th Court Mumbai had not merely recorded the substance of the evidence, but the evidence in detail was recorded by the learned Judge. He submitted that the examination-in-chief of the P.W.1 was in the form of an affidavit and her cross-examination was recorded word to word. He therefore, submitted that there was no prejudice to either party caused by the transfer of the case to the Court of learned Special Metropolitan Magistrate. He submitted that in fact after the transfer to the Court of the learned Special Metropolitan Magistrate, the affidavit of examination-in-chief of P.W. 2 was filed and first to fourth respondents cross examined him without any protest. He pointed out that the application under Section 326(3) of the said Code was made only after the complaint was adjourned for pronouncement of the judgment. He submitted that the said Application was filed with the only object of delaying the conclusion of trial.

4. The learned counsel for the first to fourth Respondents submitted that the decision of the Single Judge of this Court in the case of **Shivaji S. Jagtap (supra)** will not apply to the facts of this case. He pointed out that in the case before the learned Single Judge, the entire evidence in a complaint under Section 138 of the said Act of 1981 was recorded before the learned Metropolitan Magistrate, 17th Court Mumbai. Before the learned Judge could deliver the judgment, he was succeeded by another learned Magistrate who delivered the judgment and convicted the accused. An appeal against the order of conviction was filed before the Sessions Court. The said appeal was allowed and the case was remanded for holding a **de-novo** trial. He pointed out that the said decision of the Sessions Court was challanged before the learned Single Judge. He submited that in the context of the factual matrix of the case, the learned Single Judge interefered and has set aside the order of remand passed by the appellate Court. He submitted that in the present case,in the trial, summary procedure was adopted. He invited my attention to the provisions of Section 261, 262, 263 and 264 of the said Code. He submitted that

Sub-section (3) of Section 326 will squarely apply to the facts of the case.

5. I have carefully considered the submissions of the learned counsel appearing for the parties. It will be necessary to refer to Section 326 of the said Code, which reads thus -

> "**Conviction or commitment on evidence partly recorded by one [Judge or Magistrate] and partly by another- (1)** Whenever any [Judge or Magistrate], after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another [Judge or Magistrate] who has and who exercises such jurisdiction, the [judge or magistrate] so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself:
>
> . Provided that if the succeeding [Judge or Magistrate] is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such

witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged. (2) When a case is transferred under the provisions of this Code [from one Judge to another Judge or from one Magistrate to another Magistrate,] the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub-section (1).

(3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under section 322 or in which proceedings have been submitted to a superior Magistrate under section 325.

6. Sub-section (1) of Section 326 provides that whenever a Judge or Magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or a trial ceases to exercise the jurisdiction therein and has been succeeded by another learned Judge or Magistrate, the Judge or the magistrate so succeeding may act on the evidence recorded by his predecessor or the evidence partly recorded by his predecessor and partly recorded by himself. The proviso to

sub-section (1) gives power to the learned Judge or Magistrate so succeeding to recall any witness examined before his predecessor. Sub-section (2) provides that when a case is transferred by exercising powers under the said Code from one Judge to another Judge or from one Magistrate to another Magistrate, the former shall be deemed to cease to exercise jurisdiction therein and to be succeeded by the latter,within the meaning of sub-section (1). Thus, when a case is transferred from the court of one learned Magistrate to the court of another learned Magistrate by exercising powers under Section 407 or 408 of the said Code, the learned Magistrate to whom the case is transferred can act on the evidence recorded by the learned Magistrate before whom the case was earlier pending. Thus, in short, in such cases, it is not necessary to order **de-novo** trial. The learned magistrate to whom the case is transferred, can proceed to record further evidence, even if the evidence is partly recorded by the Magistrate before whom the case was earlier pending.

7. Sub-section (3) of Section 326 of said Code carves out an exception to the rule in Sub-section (1) and sub-section (2). The exception created by

sub-section (3) is in case of summary trials by providing therein that nothing stated in the Section 326 will apply to summary trials.

. It will be necessary to refer to the relevant provisions of the Code which deal with summary trials. Sections 262, 263 and 264 of the said Code are relevant which read thus -

> . **Section 262 :-** (1) In trials under this Chapter, the procedure specified in this Code for the trial of summons-case shall be followed except as hereinafter mentioned.
>
> (2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.
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> . **Section 263 :-** In every case tried summarily, the Magistrate shall enter, in such form as the State Government may direct the following particulars namely :-
> (a) the serial number of the case;
> (b) the date of commission of the offence;
> (c) the date of the report or complaint;
> (d) the name of the complainant (if any);
> (e) the name, parentage and residence of

the accused;

(f) the offence complained of and the offence (if any) proved, and in cases coming under clause (ii), clause (iii) or clause (iv) of sub-section (1) of section 260, the value of the property in respect of which the offence has been committed.

(g) the plea of the accused and his examination (if any);

(h) the finding;

(i) the sentence or other final order;

(j) the date on which proceedings terminated.

. **Section 264. Judgment in cases tried summarily-** In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the findings.

. Section 264 provides that in a case where summary procedure is adopted and where accused does not plead guilty, the Magistrate shall record substance of the evidence. Section 264 makes a departure from the rules which apply to trials before a court of Sessions and to the trial of warrant cases by Magistrates. In case of trials, the relevant provisions regarding recording of evidence are found in Chapter XXIII of the said

Code. Sub-section (1) of Section 274 provides that in all summons cases tried before a Magistrate, he shall, as the examination of each witness proceeds, make a memorandum of the substance of the evidence in the language of the Court. Such memorandum is required to be signed by the learned Magistrate. However, Sections 275 and 276 provide that in case of trial in warrant cases before a learned Magistrate and in case of trial in the court of Sessions, the evidence of each witness shall, as his examination proceeds be taken down in writing either by the judge himself or by his dictation in open court. The said sections further provide that such evidence shall ordinarily be taken down in the form of narrative by the Magistrate or the Sessions Judge. However, there is a discretion vested in the court to record a part of evidence in the form of question and answer.

8. In a case where summary procedure is adopted by the trial court or where procedure for trial of summons cases is adopted, it is not necessary for the learned Magistrte to record the evidence of the witnesses in the form of a narrative. In such a case it is not necessary to take down in writing by the Judge himself or by his dictation in open court

the evidence of each witness word to word. In cases where summary procedure or procedure for trial in summons cases is adopted, it is permissible for the learned Magistrate to record only the substance of the evidence in the language of the Code.

9. Sub-section (3) of section 326 carves out an exception to sub-sections (1) and (2) thereof obviously because in case of a summary trial, the learned Magistrate is required to record only the substance of the evidence as provided in Section 274 of the said Code. Therefore, in such case where the evidence of a witness is recorded by a learned Magistrate and the case is thereafter transferred to another learned Magistrate, what will be available for the succeeding Magistrate will be only the substance of the evidence of the witnesses recorded by his predecessor. In such a case, the learned Judge, who has recorded the substance has an advantage and benefit of hearing the deposition of the witnesses in its entirety. However, the succeeding Judge will never know what was exactly deposed by the witnesses before his predecessor as what will be before him is only the substance of the evidence. That is why in such a

case, the sub-section (3) of section 326 does not permit the learned Magistrate to act upon the evidence recorded by his predecessor. The obvious reason being that if succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused. Sub-section (1) and (2) of Section 326 are merely enabling provisions which do not apply to summary trials obviously because if sub-section (1) and (2) are applied in a case of summary trial, what will be available for succeeding Judge or Magistrate will be only a substance of the evidence and not the entire evidence of the witnesses in the narrative form. Thus, sub-section (3) appears to have been enacted to avoid any possibility of prejudice being caused either to the accused or to the prosecution.

10. In the present case, it is not in dispute that before the learned Metropolitan Magistrate's 40th Court Mumbai, an affidavit of examination-in-chief of the applicant / complainant was taken on record and the cross-examination of the applicant has been recorded in the form of a narrative as per the dictation of the learned Magistrate in the open court. Thus, cross-examination has been recorded

in its entirety and this is not a case where only substance of the evidence has been recorded.

11. Sub-section (1) of Section 143 of the Act of 1981 provides that all complaints under Chapter XVII of the said Act of 1881 shall be tried by the Judicial Magistrate of the First Class or by a Metropolitan Magistrate and the provisions of Section 262 to 265 of the said Code shall, as far as may be, apply to such trials. Second proviso to sub-section (1) of section 143 empowers the Magistrate to depart from the summary procedure where he finds that the nature of the case is such that sentence of imprisonment for a term exceeding one year may have to be passed or if for any other reason it is not desirable to try the case summarily.

12. Section 143 of the said Act of 1981 provides for a special procedure for trial of the complaints under Chapter XVII of the said Act of 1981, keeping in mind the legislative intent. It provides that provisions of Section 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials. It will be necessary to refer to the decision of the Apex Court in the case of **Dalmia**

Cement (Bharat) Ltd. Vs. Galaxy Traders & Agencies Ltd. and others [2001 Supreme Court Cases (Cri) 1163]. Paraghraph 3 of the said decision reads thus-

> . "The Act was enacted and Section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instruments is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be converible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present day world, are likely to be adversely affected as it is impracticable for the trading community to carry on with it the bulk of the currency in force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily passable from one hand to another. To achieve the objectives of the Act, the legislature has, in its wisdom, thought it proper to make such provisions in the Act for conferring such privileges to the

> mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged. **The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of the country."**

13. In paragraph 4, the Apex Court observed that Section 138 of the Act makes a civil transaction to be an offence by a fiction of law. As quoted earlier, the Apex Court has held that the laws relating to the Act are required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure. The Apex Court deprecated the efforts to defeat objectives of law by resorting to innovative measures.

14. In the impugned order, the learned trial Judge has observed thus -

. "On the other hand, sub-section 326 of Cr.P.C. is very much clear in view of section 143 of N I Act. The court is required to try offence punishable under section 138 of N I Act in summary manner only so whatever referred in sub-section 1 and 2 of section 326 of Cr.P.C. cannot be considered while deciding this application on its own merits. Considering all facts in particularly that plea was recorded by my Ld. Predecessor and evidence of the original complainant was recorded by him is sufficient to say that the provisions of sub-section 3 of section 326 are required to be made applicable in this case. At the time of the argument Shri Joshi has also submitted the affidavit of evidence was only tendered to then Court and it was never acted upon by then Court cannot also be considered at this stage in view of the fact that my Ld. Predecessor has specially passed an order on affidavit of evidence thereby considering it as an evidence. Had it been the case that the same order would not have been passed by my Ld. Predecessor then only, the submissions of the Ld. Advocate Shri Joshi of tendering of the affidavit only would have been considered as genuine ground and the application under order would have been consider in any other way. However, in absence of the said

fact on record the submissions cannot be considered at this stage and the same cannot be ground for refusing the reliefs sought for. Considering all these facts on record, I am of the opinion that the fact remain on record that particular matter is being previously tried by my Ld. Predecessor is sufficient ground to exercise the powers under sub-section 3 of section 326 of Cr.P.C. in favour of the applicant."

. As indicated earlier, in the present case, admittedly the examination-in-chief of the applicant is in the form of an affidavit and the cross-examination has been taken down in narrative as required by the procedure prescribed for a trial of a warrant case. The learned trial Judge relying upon the evidence of P.W.1 recorded by his predecessor, proceeded to record evidence of P.W. 2. Assuming that this is an irregularity , it is not an irregularity provided for under section 461 of the said Code and no failure of justice has been occasioned in the case.

15. In the present case, the trial was transferred to the court of Special Metropolitan Magistrate, who has been specially appointed to deal with cases

under Section 138 of the said Act of 1881, to ensure expeditious conclusion of the trial keeping in mind the mandate of sub-section (3) of section 143 of the said Act 1881 which provides that an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint. The course adopted by the learned trial Judge in passing the impugned order will defeat the objects intended to be achieved by the provisions of section 138 of the said Act 1881 . The effect of impugned order will be that the applicant will have to file a fresh affidavit of examination-in-chief before the learned trial Judge and she will be again cross-examined. There will be unnecessary duplication of the proceedings thereby completely defeating the objects of the section 138 of said Act of 1881.

. In paragraph 18 of the decision of the learned Single Judge in the case of **Shivaji S. Jagtap (supra)**, it is held thus -

. "Under section 263 in Chapter XXI of the Code, in every case tried summarily, the Magistrate shall enter, in such form as the State Government may direct, is expected to "maintain the

record" as mentioned in clause (a) to (j) of that section. Section 264 provides that in every case tried summarily in which the accused does not plead guilty, the Magistrate shall record "the substance of the evidence" and a judgment containing "a brief statement of the reasons" for the finding. Thus, the indicator to know as to whether the case under section 138 of the Act has been or is being tried summarily so as to attract the provisions contained in sub-section (3) of section 326 of the Code is the compliance of section 263 and 264 of the Code. In other words, a case which is triable as summarily, and in which the record of the proceedings has been prepared in accordance with the provisions of section 263 and 264 of the Code could be stated to have been tried summarily for the purpose of section 326(3) and in that case the evidence recorded by one Magistrate cannot be read in evidence by succeeding Magistrate. The succeeding Magistrate, however, in a case, where the procedure contemplated under sections 263 and 264 of the Code in particular has not been followed, he need not hold a trial denovo. In short, if no record as per sections 263 and 264 has been or is being maintained by the Magistrate and the case has been or is being tried as a regular summons case and not tried in a summary way as

contemplated under sections 262 to 265 of the Code, such case shall not be considered as tried in summary way, though triable summarily as provided for under sub-section (1) of section 143 of the Act, so as to attract the provisions of section 326(3) of the Code. Therefore, the evidence recorded by one Magistrate in such a case may be legally read in evidence by his sucessor and no denovo trial shall be necessary. From the above discussion, the following principle broadly emerges : a case under section 138 of the Act, which requires to be tried in a summary way as contemplated under section 143 of the Act, is in fact, was tried as regular summons case it would not come within the purview of section 326(3) of the Code. **In other words, if the case in substance was not tried in a summary way, though was triable summarily, and was tried as regular case, it need not be heard denovo and the succeeding Magistrae can follow the procedure contemplated under section 326(1) of the Code."**

16. In the present case in substance the complaint is not tried by adopting a summary procedure. Thus, in my view, the impugned judgment and order is erroneous and deserves to be quashed and set aside. However, the first to fourth Respondents

will have to be permitted to revive the Application made by them under Section 319 of the Code as the said Application was not pressed in view of the impugned order. Hence the order.

_O_R_D_E_R_

I) The impugned judgment and order dated 19th June 2006 is quashed and set aside.

II) The learned Special Metropolitan Magistrate will act on the evidence recorded by his predecessor as well as the evidence recorded by him. The learned Trial Judge will permit the first to fourth Respondents to revive an Application filed by them under Section 319 of the said Code and will pass an appropriate order thereon after hearing the parties. The learned Special Metropolitan Magistrate has already heard the final arguments. Considering the lapse of time, if the parties so desire, he will hear the final arguments afresh and pronounce the judgment in accordance with the law. This exercise shall be completed as expeditiously as possible keeping in mind the provisions of sub-section (3) of section 143 of the said Act of 1881.

III) Application is accordingly allowed.

. Writ be sent forthwith.

[ABHAY S. OKA, J.]